MINORITY VIEWS ON H.R. 3685, THE "EMPLOYMENT NON-DISCRIMINATION ACT OF 2007"

Introduction

At the federal level, numerous civil rights statutes exist to protect individuals from discrimination. Although these laws share similar features, each statute differs based upon the type of discrimination that it prohibits and the circumstances under which it operates. Arguably the most prominent among these various laws is the Civil Rights Act ("CRA") of 1964, which expanded civil rights protections to many different settings and served as a model for subsequent anti-discrimination laws. Among the provisions of the CRA, Title VII specifically prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex.[1] Title VII applies to employers with 15 or more employees, including the federal government and state and local governments.

For more than two decades, a number of bills have been introduced in Congress that sought to protect individuals from workplace discrimination on the basis of sexual orientation. Very recently, in the 110th Congress, Rep. Barney Frank (D-MA) introduced H.R. 2015, The Employment Non-Discrimination Act of 2007 ("H.R. 2015"). This bill, introduced on April 24, 2007, purports to protect against discrimination on the basis of sexual orientation and, for the first time, gender identity. On September 5, 2007, the Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions held a hearing on H.R. 2015. On September 27, 2007, because of questions raised at that hearing and questionable support for H.R. 2015, Rep. Frank introduced two new bills, H.R. 3685 and H.R. 3686, which split the protections for sexual orientation and gender identity, respectively. On October 18, 2007, the full Committee on Education and Labor proceeded to markup H.R. 3685, which provides protections on the basis of sexual orientation only. Subsequently, the Committee on Education and Labor ordered reported H.R. 3685.

The Minority Members of this Committee have consistently stated their opposition to intentional workplace discrimination. However, H.R. 3685 as reported out of Committee raises many legitimate concerns that remain unresolved. For example, the bill's religious exemption fails to adequately protect certain religious employers from liability. Also, the bill provides unprecedented protection against discrimination based on "perceived" sexual orientation. For these reasons and others detailed later in this document, the majority of Committee Republicans reject this legislation, and urge its defeat on the House Floor. Further, the House should reject any attempt to amend this bill to add protections for gender identity.

Federal Legislative History

A variety of federal proposals have been introduced over the last two decades that sought to protect against workplace discrimination on the basis of sexual orientation. Included in these efforts were relatively simple proposals to amend Title VII of the CRA to add the term "sexual

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1 42 U.S.C. § 2000e.

orientation" to existing categories afforded protection, such as race.[2] Since it was first introduced in the House and the Senate in the 103rd Congress, the Employment Non-Discrimination Act (ENDA) has been the primary legislative vehicle for extending federal employment discrimination protections to employees on the basis of their sexual orientation. While many Democrats and some Republicans have supported ENDA legislation, the bill has not garnered the support necessary to move through Congress. In September 1996, the Senate voted on a prior version of ENDA, but the bill was defeated by a vote of 50-49 (Roll Call Vote No. 281). The last major action on this issue took place in the Senate during the 107th Congress, when the Senate Health, Education, Labor, and Pensions (HELP) Committee under Chairman Kennedy held a hearing, marked up a bill, and reported it favorably out of Committee. Despite reporting the bill favorably, Senate HELP Committee Republicans, who did not support the legislation, voiced concerns and claimed that "...the legislation remains overly broad and unclear in many respects, specifically, with regard to its effect on individual, constitutional, and States' rights."[3] That bill was placed on the Senate Legislative Calendar under General Orders, but did not move any further.

In the 108th Congress, an ENDA bill (H.R. 3285) was introduced by Rep. Christopher Shays (R-CT), but there was no action taken on that bill. Subsequently, legislation was not introduced during the 109th Congress. In the 110th Congress, Rep. Frank introduced three separate ENDA bills that included protection against discrimination on the basis of gender identity (defined below), as well as sexual orientation. Given the considerable policy and political questions raised by this legislation, a discussion of these three ENDA bills is appropriate to illustrate its progression.

H.R. 2015, the Employment Non-Discrimination Act of 2007

Rather than amend existing civil rights laws, H.R. 2015 was drafted as a stand-alone anti-discrimination law, but generally has the same enforcement scheme and remedies as Title VII of the CRA (Title VII) and the Americans with Disabilities Act (ADA). Central to its purpose, the bill, at Section 3(a)(9), defines "sexual orientation" as "homosexuality, heterosexuality, or bisexuality." Also, Section 3(a)(6) defines gender identity as "the gender-related identity, appearance, mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."

H.R. 2015 would address employment discrimination in four areas. First, the legislation would make it unlawful to fire, refuse to hire or take any other action that would adversely affect a person's status as an employee based on his or her actual or perceived sexual orientation or gender identity.[4] With language borrowed from the ADA, the legislation also prohibits "association discrimination" as a result of the actual or perceived sexual orientation or gender identity of someone with whom an employee associates. Second, H.R. 2015 would prohibit discrimination against an individual who has opposed or spoken out against an unlawful

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2 *See,* CRS Report RL31863, *Sexual Orientation Discrimination in Employment:Legal Analysis of Title VII of S.16, the Employment Nondiscrimination Act of 2003.*

3 "Minority Views", S. Report 107-341, p. 39 (2001).

4 Employer actions that aversely affect a person's status as an employee relate to compensation, benefits, training programs and opportunities, and union membership.

employment practice. Third, the bill would not permit the creation or use of preferential treatment or employment quotas based on perceived sexual orientation or gender identity. Finally, H.R. 2015 requires that employers must have policies in place to address dress standards and gender-segregated facilities (such as changing areas) in the workplace.

Similar to current requirements under Title VII, H.R. 2015 would apply to private employers with 15 or more employees, labor unions, employment agencies, and federal, state, and local governments. The bill contains a number of exemptions, including those for members of the armed forces, private employers with less than 15 employees, and religious and religious-affiliated entities. Also, H.R. 2015 would grant the Equal Employment Opportunity Commission (EEOC) and other appropriate agencies the power to enforce the Act. If an employee's complaint is not resolved by the EEOC, the legislation would allow an individual to file suit seeking punitive and compensatory damages up to a cap of $300,000 and attorney's fees.

Notably, H.R. 2015 differs in several significant respects from prior versions of ENDA. H.R. 2015 adds, for the first time, gender identity as a protected classification which would prohibit workplace discrimination against transgendered individuals.[5] Section 4(b) of the bill makes it an unlawful employment practice to discriminate against an individual because of "the actual or perceived sexual orientation or gender identity" of the individual. The inclusion of protection based on "perceived" gender identity would likely raise issues as to how employers could accommodate individuals who perceive themselves to be of the opposite gender, and therefore comply with the legislation.

In addition, although the bill retains language from previous bills that would not require domestic partner benefits, H.R. 2015 would exempt any state and local rules from preemption under the Employee Retirement and Income Security Act (ERISA). This exemption would be contrary to longstanding precedent that prevents state and local mandates on employer-provided benefits.

Further, H.R. 2015 contains insufficient exemptions for religious organizations and actions based on religious beliefs, and actually narrowed the single broad exemption for religious-affiliated organizations contained in the ENDA legislation introduced in the 108th Congress (H.R. 3285). First, under H.R. 2015, all houses of worship, missions or schools that have the purpose of religious worship or teaching of religious doctrine would be completely exempt. Second, in religiously-affiliated entities, employees who teach or spread religion, take part in religious governance or supervise those who teach or spread religion are completely exempt. Third, a religiously-affiliated entity can require all or some employees to conform to religious tenets as set forth by the organization regardless of sexual orientation or gender identity.[6] Although seemingly intended to cover a wide range of religious organizations and activities, the H.R. 2015 religious exemption is far more prescriptive that earlier versions and the existing exemption contained in Title VII of the CRA, and it therefore results in a far narrower religious exemption. Although a broader religious exemption had been proposed in a prior

5 Transgendered individuals are individuals of one sex who, by surgery or other means, change their gender to the opposite sex.

6 Since these exemption provisions are narrower than the religious exemptions contained in Title VII, this proposed exemption has raised significant concern among religious employers (detailed below).

Congress, those who previously sponsored and supported H.R. 2015 chose, inexplicably, to narrow the exemption.

In addition to the Committee on Education and Labor, H.R. 2015 was referred to three other committees of jurisdiction: the Committee on House Administration, the Committee on the Judiciary, and the Committee on Oversight and Government Reform. To date, none of the other committees of jurisdiction have taken any official action on H.R. 2015.

On September 5, 2007, a legislative hearing on H.R. 2015 took place before the Committee on Education and Labor, Subcommittee on Health, Education, Labor, and Pensions. Witness testimony at that hearing raised several substantive concerns about ENDA legislation in the 110th Congress, many of which have yet to be addressed by the Majority.

H.R. 3685, the Employment Non-Discrimination Act of 2007

On September 27, 2007, in apparent recognition of the fundamental policy flaws contained in H.R. 2015 and diminishing support for that bill as a result of those flaws, Representative Barney Frank introduced two bills, H.R. 3685 and H.R. 3686 which, respectively, split the protections against discrimination based on sexual orientation and gender identity into two separate bills.

Although H.R. 3685 attempts to address certain concerns, many of its provisions are similar to those contained in H.R. 2015 and therefore continue to raise significant policy questions. H.R. 3685 removes "gender identity" as a protected classification, and conforms the retaliation provision to existing law under Title VII. However, H.R. 3685 revises the religious exemption, ostensibly to conform to the exemption under Title VII. The new provision, however, still fails to protect many religious organizations that would qualify for an exemption under Title VII. Further, H.R. 3685 retains vague and unworkable references to the "perceived" sexual orientation of individuals. The bill would still make it unlawful to condition employment, in a state in which a person cannot marry a person of the same sex, either on being married or being eligible to marry.

H.R. 3686, to Prohibit Employment Discrimination Based on Gender Identity

On September 27, 2007, Representative Frank also introduced H.R. 3686, legislation which is intended to complement the so-called "improved" version of ENDA embodied in H.R. 3685. The stated purpose of H.R. 3686 is to prohibit employment discrimination based on gender identity.

Again, many of the provisions of H.R. 3686 are similar to those contained in H.R. 2015; but the legislative language of H.R. 3686 contains fatal flaws and raises significant concerns that undermine the fundamental policy promoted by this bill. Like H.R. 3685, the revision to the religious exemption in effect fails to protect many religious organizations that would qualify for an exemption under Title VII. H.R. 3685 also retains the vague and unworkable reference to the "perceived" gender identity of individuals. This is arguably even more problematic than use of the term as applied to sexual orientation, since perception of one's gender could be inherently

more difficult to ascertain from day to day. Further, H.R. 3686 contains language governing employer rules and policies with respect to certain shared facilities and dress and grooming standards, provisions that were initially included in H.R. 2015. Although the Majority attempts to address concerns regarding certain shared shower or dressing facilities by stating "nothing in this Act shall be construed to require the construction of new or additional facilities," significant questions still remain regarding what constitutes reasonable access to such facilities, which will result in great uncertainty and litigation.

Legislative Activity

Legislative Hearing on H.R. 2015

The only hearing on ENDA legislation during the 110th Congress occurred on September 5, 2007, before the Committee on Education and Labor, Subcommittee on Health, Education, Labor, and Pensions. The subject of the legislative hearing was H.R. 2015. Notably, the full Committee on Education and Labor failed to hold a legislative hearing on that bill, or any other ENDA legislation, thereby depriving most Committee Members of the opportunity to hear testimony on the merits and/or flaws of the bills prior to their consideration.

At the September 5, 2007 hearing, testimony was received from Representatives Barney Frank, Tammy Baldwin, and Emanuel Cleaver, II, along with two alleged victims of discrimination, two representatives from academic institutions, and two company representatives. Additional witnesses included Lawrence Lorber, Esq., an experienced labor and employment lawyer, and Mark Fahleson, Esq., a labor and employment lawyer who counsels small and medium-sized businesses, including religious colleges and universities. Although purported to be a legislative hearing on the provisions of H.R. 2015, most of the testimony from the Majority's witnesses focused on personal experiences and opinions concerning discrimination. By contrast, most of the discussion of substantive problems and concerns with the actual legislative language was provided by the Republican witnesses, Mr. Lorber and Mr. Fahleson.

The two witnesses who testified on behalf of private business, Ms. Kelly Baker from General Mills and Ms. Nancy Kramer, owner of an Ohio marketing services company, stated that promoting a diverse work environment, that respects individuals' sexual orientation, helps their businesses improve productivity and compete more effectively.[7] This testimony raises the question of whether a federal directive applied to the free market is necessary in light of voluntary (and apparently successful) private-sector efforts to promote diversity and improve business performance.

Mr. Lorber and Mr. Fahleson focused their written testimony and verbal comments on substantive concerns with H.R. 2015. Mr. Lorber initially noted that the "[g]reatest single area of growth in federal civil litigation involves employment and labor law. Therefore the Congress

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7 *See generally,* Testimony of Nancy Kramer, Founder and Chief Executive Officer, Resource Interactive, and Testimony of Kelly Baker, General Mills, Inc., Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007).

should be cautious in adding to this growing and complex list of laws, and thereby the potential for increased litigation."[8] He then went on to highlight concerns with various provisions of the bill, including the need to appropriately define the term "disparate impact" and clarify that only intentional circumvention of the Act is implicated in order to avoid attacks on neutral employer rules and policies. Also, Mr. Lorber raised multiple technical concerns resulting from inclusion of gender identity as a new protected class, and the need to conform the bill's prohibition against retaliation with existing Title VII language.

Mr. Fahleson began his testimony by raising a threshold question as to whether there was a need for a federal remedy at this time. In his own words:

> I believe it is appropriate to ask the question: is a broad, new federal remedy for sexual orientation and gender identity employment discrimination such as that embodied in H.R. 2015 necessary at this time? As the Committee is aware, a significant number of employers have voluntarily adopted policies barring discrimination on the basis of sexual orientation and transgender status. In addition, several states and municipalities have enacted local regulatory schemes addressing sexual orientation and/or transgender discrimination in the workplace. For the last 32 years legislation has been introduced in Congress seeking to prohibit sexual orientation discrimination in employment. Meanwhile, it appears that the free market and local regulators are already addressing the issues raised by this legislation.[9]

Mr. Fahleson also raised concerns regarding the cost of this legislation, especially the potential impact on smaller employers that have less ability absorb financial costs associated with this regulation. Further, he expressed concerns that the exemption for religious organizations was far narrower than the current exemption under Title VII, and raised a number of hypothetical situations in which eligibility for the exemption was questionable. Mr. Fahleson opined that "[t]he blanket exemption for religious organizations found in prior versions of ENDA provides greater certainty and is less problematic for religious and faith-based employers, as well as the judiciary."[10]

Committee Republicans share the concerns expressed by Mr. Lorber and Mr. Fahleson that H.R. 2015 creates significant policy questions on the issue of extending federal protections based on sexual orientation and gender identity. Left unanswered, these questions could result in severe burdens being placed on employees and employers. Such questions must be addressed before extending new federal protections and requirements in this area.

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8 Testimony of Lawrence Z. Lorber, Esq., Proskauer Rose LLP, Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007), at 2.

9 Testimony of Mark A. Fahleson, Esq., testifying individually, Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007), at 1.

10 *Id.*, at 4.

Committee Legislative Action

Despite the fact that a legislative hearing was held on H.R. 2015, the Committee did not further consider H.R. 2015.

Instead, on Thursday, October 18, 2007, the Committee on Education and Labor met to consider H.R. 3685, without the benefit of any legislative hearing on the bill or the ways in which it differs from H.R. 2015, the bill that did receive some limited scrutiny from the Committee. Republican Members offered four (4) amendments designed to: (1) broaden the exemption for religious schools not covered under H.R. 3685; (2) strike the term "perceived" sexual orientation, which is vague and will create uncertainty in the workplace; (3) prohibit retaliation against employees who may not agree with employer policies relating to the Act on the basis of sincerely held beliefs; and (4) remove the provision making it unlawful to condition employment, in a state in which a person cannot marry a person of the same sex, either on being married or being eligible to marry. These amendments were rejected by the Committee. The Committee favorably reported H.R. 3685 on a roll call vote of 27 to 21.

Republican Views, H.R. 3685

Committee Republicans are generally committed to the principle that discrimination in the workplace is unacceptable. It is for that reason that we support the current-law protections provided under Title VII of the Civil Rights Act. However, we also believe that before imposing any new federal mandates in this area, even those cloaked in the honorable moniker of "non-discrimination," the Committee and Congress must thoroughly and thoughtfully examine the need for such mandates and must evaluate the substantive implications of the legislative proposals. In this regard, the Committee has fallen short. Not only has the Majority provided little compelling evidence as to the need for this legislation, but they have also failed to fully address the substantive concerns it raises.

Remarkably, although absent from the bill reported by the Committee, the issue of providing discrimination protections on the basis of gender identity remains clearly on the Majority's agenda for future consideration. Indeed, at the conclusion of the Committee's consideration of H.R. 3685, several Committee Democrats voiced their intent to amend the bill during its consideration by the full House of Representatives by inserting additional protections for gender identity. While we do not question the right of our Democrat colleagues to offer such amendments, we do believe their expressed intention to do so begs an important question: Why was an amendment to include protections from discrimination on the basis gender identity not offered by these Members during the Committee's consideration of the bill? Indeed, why were gender identity protections – expressly provided in H.R. 2015 – dropped from the bill that was brought before the Committee? The answer, of course, is rooted in the fact that extending non-discrimination protections to gender identity not only raises substantive and policy-related questions that the Majority cannot answer, it is also politically untenable. That Committee Democrats would forgo the opportunity to include such protections during the Committee's consideration of the bill merely underscores this fact.

Finally, we are troubled by the fact this legislation is proceeding to the House floor without adequately resolving outstanding issues and urge that the House of Representatives reject it, along with any amendments that seek to include protections based on gender identity.

The Bill Fails to Protect the Hiring Prerogatives of Religious Schools

H.R. 3685 attempts to provide an exemption for religious organizations, including religious educational institutions. However, the bill's definition of "religious organizations" contains a two-part test used to determine if an educational institution qualifies for an exemption. This test, found in Section 3 (a)(8) of the bill, requires that the school be "controlled, managed, owned, or supported by a *particular* religion"; or, have its curriculum "directed toward the propagation of a *particular* religion."(*emphasis added*). Although this exemption is broader than that contained in H.R. 2015, it still does not provide the broad protections that exist under current law. Moreover, it fails to cover non-denominational religious schools and invites the federal government to investigate the religious nature of schools' curricula, effects we find unacceptable.

Despite assertions by the Majority that the exemption in H.R. 3685 is the same as the exemption found in Title VII, a plain reading of both reveals the Majority's assertion is incorrect. Current law, under Title VII, as amended, broadly exempts religious corporations, associations, societies, and educational institutions.[11] Title VII also contains a provision, the so-called "bona fide occupational qualification" (BFOQ), which provides further protections applicable to educational institutions in certain rare circumstances.[12] The BFOQ provision is rarely utilized in practice, because of the initially broad protections for educational institutions contained in Title VII. However, H.R. 3685 changes the nature of the exemption under Title VII with respect to educational institutions because, rather than simply providing a broad exemption for "educational institutions," it qualifies the exemption for such institutions by using the BFOA provision exclusively. This creates several unresolved problems.

For example, a non-denominational, independent faith-based school that is not controlled or supported by a "particular" religion, or whose curriculum is not directed toward propagation of a "particular" religion, may not be exempt from this legislation, even though religion forms the foundation of its mission. Unfortunately, there are many schools that may be penalized by this provision. One such institution, Wheaton College in Wheaton, Illinois, expressed serious concerns about the religious exemption in H.R. 3685. In a letter dated October 3, 2007 to Congressman Tim Walberg, the President of Wheaton College, Duane Litfin, stated as follows:

11 *See,* 42 U.S.C. Section 2000e-1.
12 *See,* 42 U.S.C. Section 2000e--2(e)(2).

On behalf of Wheaton College I want to register our concern about a bill that has been introduced in the U.S. House titled "To prohibit employment discrimination on the basis of sexual orientation or gender identity," and referred to as the Employment Non-Discrimination Act or ENDA (HR 3685). Appropriately, the Act provides a religious exemption consistent with the Civil Rights Act as Amended in 1972. However, the categorical religious exemption is undermined in Section 3(a)(8) of the Act by **a problematic definition of religious organization** that casts doubt on whether Wheaton College would be exempt. As I understand the definition language, educational institutions that are themselves religious but that are not controlled by some other religious organization, such as a church or a denomination, may not be covered by the religious exemption.

Wheaton College has a clearly defined religious identity, dating back to its founding in 1860, including a Statement of Faith to which all of our employees give assent, and a Community Covenant to which all of the members of our community adhere. Nevertheless, Wheaton College is not controlled by a religious corporation, but rather by a self-perpetuating Board of Trustees.

Surely a religious college such as Wheaton should be permitted the same protection of its religiously motivated hiring rights as those colleges that are controlled by churches or other religious organizations.

Since 1972 when the Civil Rights Act was amended to forthrightly protect the mission-critical hiring rights of religious organizations, including religious higher education, we have been able to grow and expand our service to our communities with a robust religious mission and distinctive approach because we have had the ability to select all of our staff on a religious, mission-critical basis. Our continued existence as a distinctively religious institution, and with it, a diverse and thriving higher education sector, is threatened because the proposed ENDA, with its limiting and non-categorical religious exemption, does not clearly and fully ensure our religious, mission-critical staffing freedom.

I urge you to **remove the problematic religious definition language** currently in ENDA and ensure that the Act categorically exempts religious organizations as in Section 702(a) of Title VII of the Civil Rights Act of 1964, as amended.

The concerns expressed by Mr. Litfin are not unique to Wheaton College. Indeed, the impact of the insufficient religious exemption has engendered comments from numerous organizations, who expressed serious reservations similar to those expressed by Wheaton College. Those commentators included:

The Council for Christian Colleges & Universities
Agudath Israel of America
The American Association of Christian Colleges & Seminaries, Inc.
The American Association of Christian Schools
The Family Research Council
The Ethics & Religious Liberty Commission of the Southern Baptist Convention

The Traditional Values Coalition
The American Center for Law and Justice.

This is by no means a comprehensive list of concerned parties, but reflects the concern of many impacted institutions and organizations who find the current exemption to be wholly insufficient.

Additional concerns regarding the so-called religious exemption are also worthy of mention. For example, if the current exemption were to be enacted, religious schools would likely be subjected to a "denominational" test. Such a test would inevitably "entangle" the federal government in the practice of religion, since it invites courts to examine the beliefs and practices of religious schools to determine if they are "religious enough." In addition, H.R. 3685 would vest the EEOC with regulatory, enforcement, and investigatory powers. This would require the EEOC to investigate and determine whether institutions are associated with "particular" religions or whether the curriculum of an institution is directed toward the propagation of a "particular" religion. In doing so, the provisions would entangle a Federal agency in complex questions involving religious missions and doctrine and would require promulgation of Federal rules governing this area of inquiry. This intrusive federal inquiry into the religious beliefs of schools arguably violates the constitutional separation of church and state. Religious schools and faith-based institutions should be free to exercise their religious beliefs without government intrusion.

Also, in an effort to qualify for the exemption, religious schools may be forced to alter their curricula in an attempt to focus it on the "propagation of a particular religion." Forcing schools to choose between adopting a "particular religion" or relinquishing hiring prerogatives would be antithetical to, and in conflict with, the mission of many of these faith-based schools.

Uncertainties associated with the new exemption would result in lengthy and expensive litigation to uphold religious freedoms and the separation of church and state. Litigants would use this loophole to bring suits against the schools, forcing them to hire individuals whose lifestyles might violate the schools' core principles.

In an effort to address the insufficient religious exemption, Republican Members overwhelmingly supported an amendment by Rep. Hoekstra at the full Committee markup that would appropriately expand the exemption to include religious and faith-based schools. More specifically, the amendment would have stricken the requirement to associate with a "particular" religion, and would have provided an exemption for institutions that maintain a faith-based mission. Unfortunately, the Majority refused to address the legitimate concerns regarding the religious exemption, and the amendment failed.

The Bill Provides Vague Prohibitions Based on "Perceived" Sexual Orientation

H.R. 3685 prohibits – as did its predecessor, H.R. 2015 - employers from discriminating against an individual because of an individual's actual or "perceived" sexual orientation. The bill also makes it unlawful to discriminate against an individual based on the actual or "perceived" sexual orientation of a person with whom the individual associates or has

associated. Despite its significance to the bill's underlying policy, the term "perceived" is not defined anywhere in H.R. 3685. Its inclusion raises a number of practical and legal concerns that remain unaddressed.

At the Subcommittee hearing on H.R. 2015, one of the witnesses, Mr. Lorber, expressed general concern regarding legal protections based on perception, which would be applicable to perception as applied to both sexual orientation and gender identity. In his own words, Mr. Lorber states:

> Section 4 (e) is modeled after the ADA, 42 USC sect 12112 (b)(4) and is understandable when applied to defined characteristics. It is less than clear, however, when applied to non- inherent characteristics which may be self-perceived by the individual but not apparent to the employer. This will seem to create the potential for difficult enforcement and even more potentially difficult litigation since the underlying issue may be ephemeral or not readily apparent to the employer. Again, understanding the law makes compliance with the law an acceptable undertaking.[13]

The issue raised by Mr. Lorber highlights the fact that a perception of an individual being homosexual or bisexual is a highly subjective determination. An individual may "perceive" themselves to be homosexual, but this may not be apparent to others. Yet, notwithstanding the lack of clarity, this could still provide the basis for a discrimination claim. In the litigation context, determinations would have to be made involving consideration of evidence that is highly subjective, circumstantial, or contradictory. This would make it virtually impossible to make factual determinations with a high degree of certainty and confidence.

The potential impact on employers is profound. Even though employers would have difficulty in identifying non-inherent characteristics of a person, they would still be subjected to claims and potential liability. Even though an employer may not be capable of perceiving a person to be homosexual, if they have fifteen or more employees and are otherwise subject to this bill, they would have to defend themselves in lawsuits by having to prove a negative; that they did not "perceive" the person to be part of a protected class. Difficulty in enforcing this provision will undoubtedly lead to costly litigation. Or, in the alternative, employers - especially small employers with limited resources – may simply choose to settle these cases regardless of the merits, in order to avoid lengthy and costly litigation.

It is worth noting that the term "perceived" does not appear in any other civil rights legislation, including Title VII, which protects race, color, religion, sex, and national origin. As such, there is simply no reason to provide more statutory protection for one protected class over other protected classes. Although the Majority may claim that the ADA protects persons "regarded as" having a disability, that term is different from "perceived" and is applied to protect situations that are different from those to be addressed by this bill. Their analogy to the ADA is

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13 Testimony of Lawrence Z. Lorber, Esq., Proskauer Rose LLP, Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions Hearing, "The Employment Non-Discrimination Act of 2007 (H.R. 2015)" (September 5, 2007), at 3.

off the mark. For example, an employer may more easily be able to identify an apparent condition, for example the fact that a worker suffered a treatable heart attack, and "regard" that employee as being disabled. A person's sexual orientation may not be so readily apparent to an employer, and thus protection against discrimination based on "perceived" sexual orientation is not appropriate.

The Majority denies these valid concerns, by simply stating that the inclusion of this term is necessary to protect the rights of employees, and that employers could use the absence of this term to defend against lawsuits by claiming they did not know the "actual" sexual orientation of the individual. However, this explanation evades and ignores the expansion of statutory rights based on sexual orientation, beyond the current statutory protections for race, color, sex, religion and national origin.

At markup, Rep. Souder offered an amendment to strike the term "perceived" from the bill. This amendment was rejected. Inclusion of the statutory extension of protection on the basis of "perceived" sexual orientation is justification to reject this bill.[14]

Policies Conditioning Employment on Marriage

Under the bill it is unlawful to condition employment, in a state in which a person cannot marry a person of the same sex, either on being married or being eligible to marry.[15] The Majority claims that this provision purports to protect against instances where an employer would use marriage as a pretext for discrimination. On its face, the inclusion of such a provision would suggest that employers routinely engage in such pretext, and that they regularly condition employment with their companies for the sole purpose of engaging in discrimination. Yet, the Committee heard no testimony, nor is there any history of case law, to suggest that employers use such a pretext in order to discriminate on this basis. As such, the provision is unnecessary, in the first instance.

Beyond the apparent lack of need for the provision, its practical implications are significant. Current law permits employers to adopt policies on the basis of behavior expectations, if such policies are applied equally to all employees. In some work environments – or for some specific jobs – it may be entirely appropriate to condition employment on marital status. Take, for instance, certain groups, such as Boys and Girls Ranch organizations, which provide residential treatment programs designed to help at-risk children and families. If this provision of the bill were enacted, these organizations could be precluded from using married couples for "house parent" positions. In short, the provision could prevent employers from hiring people they believe to be best-suited to the job.

In addition, employers could be precluded from implementing codes of ethics with respect to employees' behavior. One such example would be a policy that discourages any form

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14 If protection based on "perceived" gender identity were added to this bill, it would raise similar significant, and perhaps even greater, concerns regarding its application in the workplace. For example, questions regarding employee privacy and reasonable accommodation of transgendered individuals and coworkers would arise. Such an extension of the law, if attempted, is wholly inappropriate and should be rejected.
15 H.R. 3685, Section 8(a)(3).

of extra-marital conduct, both homosexual and heterosexual. Such codes are reasonable and legal under current law. The provision would limit the ability of employers from instituting such policies or others they believe to be in the best interest of their companies and their workers.

Finally, the provision undermines the ability of states to define, preserve and protect the institution of marriage. Only one state, Massachusetts, permits same-sex marriage. The other 49 states currently have chosen to prohibit same-sex marriage. This provision directly challenges and circumvents independent state determinations to define and protect their definitions of marriage. At least one commentator, the American Center for Law and Justice (ACLJ), in an October 1, 2007 memorandum to the Chairman and Ranking Member of the Committee's HELP Subcommittee, highlighted this concern.[16]

In order to maintain the current legal right of employers to maintain codes of conduct, and to preserve 49 independent state determinations regarding the definition of marriage, Republican Rep. Souder offered an amendment to strike the provision at markup. Unfortunately, this amendment was rejected by the Majority.

Protection From Retaliation

The bill makes it unlawful to discriminate or retaliate against an individual because the individual opposed any practice made unlawful by the bill, or participated in a proceeding relating to the bill. However, the bill fails to protect those who may not agree with employer policies relating to this Act, because of sincerely held beliefs regarding sexual orientation. This creates an imbalance with respect to protections from retaliation by excluding certain individuals from those protections.

This is not some theoretical concern, proffered merely to provide yet another reason to oppose this bill. In fact, Members were provided with substantial anecdotal evidence of instances where employees were disciplined, or even terminated, for failing to embrace their employers' policies, irrespective of whether those policies conflicted with the employee's sincerely held religious beliefs.

It is simply unfair to provide legal protections relating to sexual orientation, without also protecting the rights of individuals to be free from retaliation for disagreeing or refusing to consent to employer policies on this issue. Certain people, because of sincerely held beliefs, may have great difficulty consenting to employer rules, policies – such as diversity training programs - related to treatment of sexual orientation in the workplace. It is unfair to leave these employees open to punishment or retaliation, while at the same time providing new protections to another class of workers. Further, freedom of speech and free exercise of religious beliefs may be at issue. The failure to provide protections against retaliation would place a severe, unjustified, and wholly unnecessary burden on an individual.

In an effort to restore this balance of protections, Rep. Souder offered an amendment that would have clearly and unambiguously extended protection against retaliation to employees

16 *See*, Comments of the ACLJ on the Employment Non-Discrimination Act of 2007, addressed to the Hon. Robert Andrews, Chairman, Hon. John Kline, Ranking Member (October 1, 2007).

who, because of burdens on sincerely held beliefs, may choose not to provide consent to employer policies on this issue. Unfortunately, the Souder amendment was rejected by the Committee.

Protection Against Discrimination Based on Gender Identity

Although absent from the bill under consideration, H.R. 3685, the issue of extending non-discrimination protections based on gender identity is clearly on the agenda for future consideration by the House. In fact, several Members at markup expressed the intent to offer an amendment to this bill to extent such protection prior to or during a House Floor vote on this bill. Accordingly, it is appropriate to raise concerns regarding this issue at this time.

Evidence presented for the record at the September 5, 2007 HELP Subcommittee hearing on H.R. 2015 raised numerous concerns associated with gender identity. The problems associated with providing protection based on "perceived" status are more compounded in the case of gender identity. The question of providing reasonable accommodation for such employees is extremely problematic. Employee privacy issues are significant. Litigation concerns abound.

Simply put, it is premature to consider extending protections based on gender identity, a fact grudgingly acknowledged by the bill's own sponsor. This becomes more apparent in light of the sparse legislative history and consideration of this issue. Any attempt to amend this bill to add protections based on gender identity should be rejected by the House.

Conclusion

As noted repeatedly throughout these Views, Committee Republican Members strongly oppose intentional discrimination in the workplace. We also believe the protections found in Title VII of the Civil Rights Act to be, on balance, sufficient for guarding against such discrimination. We therefore find H.R. 3685, the Employment Non-Discrimination Act, to be unnecessary in the first instance. Moreover, we find many of the bill's provisions, and the policy questions they raise, to be troubling. Among its more obvious flaws, the bill fails to provide an adequate exemption for religious organizations, including many faith-based educational institutions. It also includes questionable protections based on "perceived" sexual orientation, which will result in great uncertainty as to the meaning and application of this term, leading to costly and unnecessary litigation. The bill also precludes employers from regulating workplace conduct, despite the lack of evidence supporting the need for such a provision and the adverse impact on employers' ability to institute policies for the benefit of companies and their workers. Finally, the bill fails to provide a proper balance with respect to retaliation, unfairly according protections to one class of employees but not others. In every instance, Republican Members offered viable and entirely reasonable proposals to address these concerns. Unfortunately, those proposals were rejected by the Majority. The result of these legislative machinations is a bill that, however well-intended, favors a certain protected class of individual over other classes already protected under current civil rights law, and over individuals with sincerely-held moral and religious beliefs. It is for these reasons that Republicans opposed the bill during its

consideration by the Committee on Education and Labor, and why we urge its defeat when considered by the full House of Representatives.

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